THE RESPONSIBILITY FOR A CRIMINAL OFFENCE

Introduction: The efficiency issue

Each regulation implies that a large amount of people will be involved in the process, so that passing or repealing the law could have both good or bad effects on one’s own life. That’s when it comes to regulation content. No more than a century ago, the British economist A. Marshall strived to find a solution for this issue. According to Marshall, it may prove useful to ask each person how much they are willing to pay to benefit from this process (in case they would benefit of any amendment to the law), or to avert any ensuing damage (in case changes could be of any damage). If our research will have a positive outcome, we could point out that these changes are for good and represent a significant improvement from an economic point-of-view. However if we decide to go for this approach, we come to uncritically accept each person point of view on the value of those circumstances affecting their economic situation. Plus, we cannot expect each of them to tell us the truth. This is the reason why it is more appropriate to analyse people behaviour rather than asking questions, trying to understand how much they are willing to pay for certain benefits and eventually defining the following concept (the so-called revealed preference approach).

The theory of economic efficiency suffers from the influence of 3 main limits:

1. This theory stems from the prominence of consequences, thus losing the chance of an analysis of each regulation based on non-consequential criteria, such as the criterion of justice;
2. It is based on the assumption that the appropriate values to express the assessment of efficiency are those of each person and they are revealed by their own actions;
3. It also gives for granted that the best method to measure the intensity of preferences is to observe people willingness to pay.

Referring back to the last criticism we could state that it is hard to find a better method to define a value. An alternative to Marshall point-of-view is the theory of efficiency developed by the Italian economist Pareto. Pareto avoids comparing one’s individual benefit or loss focusing on the concept of “improvement” as a change that produce benefit for the entire society. According to the author, it is rather absurd to share this approach, as a matter of fact, due to the complexity of our society, an amendment to a regulation is quite unlikely to produce only benefits without no loss. Therefore in this report when referring to the concept of efficiency, Marshall’s theory is to be applied.

**The logic of the tort**

A tort can be defined as an intentional or unpremeditated behaviour contrary to the law. The system of tort liability requires a series of duties directly arising from law enforcement (as opposed to contracting). It is up to civil liability rules to determine which behaviour are contrary to the law. Moreover, the system of tort liability allows to establish the responsibility of any individual for those damages caused by his behaviour and to understand what are the criteria to measure it.

**Opposition to the law**

We may consider the compensation as a way to force a potential perpetrators of abuse to take on the costs involved with the victims, it is a legal mechanism that leads to efficient solutions through the internationalization of externalities. It is clear that the damage determined on the part of producers already in the market as a result of the work in it of an additional competitor is only a financial externality (in terms of profit producers lose out, but it benefits consumers). According to the author there are 3 basic reasons why certain acts, even if they import a cost to other individuals, are not considered unlawful acts:
1) whether the behaviours set a transfer rather than a net cost;
2) if they impose a cost that is not worth to do away with the remedy offered by regulations;
3) if they can be better controlled by a regulation that establishes property rights instead of giving tort liability. But when a certain action imposes a cost to others and is contrary to the law creating an unlawful demand that we must ask is: what does it mean to say that a particular fact has caused harm?

**Causality**

The author begins with a case actually occurred in order to face the problem up. A tree fell on a trolley moving injuring some passengers, one of them sued for damages for his defence being able to show that the bus was there when the tree fell, because the driver had exceeded the speed limit. Starting from the premise that violating knowingly a law it is an evidence of negligent conduct, it was easy to prove that the driver, legally, had negligently acted, becoming cause of injuries passengers. But the plaintiff lost the case, because the act of driving faster did not increase the ex ante probability that the tree fell on the trolleybus.

Indeed, the presence of contributory causes, that contribute to accidental event, represents an extreme case of the most general problem of predictability of the occurrence. The reason for which recognize compensation is to provide incentives not to engage in actions, that could impose a cost to others. But this is of no use if the agent is not aware, and above all could not be, the possibility that his behavior will end up imposing costs on others (such as the trolley). This conclusion does not apply if the agent could have learned of it. Drawing the line between predictable, easily predictable and absolutely predictable will be a problem for judges and magistrates.

The author then focuses on further example of another problem facing the emerging theory of causation. It is the example of two hunters who mistake the third for a deer and shoot at the same time, the widow promotes a civil and in the course of the trial, each hunter declares its readiness to pay compensation, but each of them noted that
the cost of the second bullet is equal to zero, and if we conceive of the rules governing tort liability as a system of incentives, what matters is the marginal cost. The result is paradoxical. In fact, if it was just one hunter who fired, killing one other person, he should pay compensation to the widow, and if two players hit another killing anyone of them is liable to compensate the latter's death. Of course, the majority opinion does not agree with these results, tending to several legal principles. A solution to the problem of hunters it is the fact that it integrated the inappropriate payment of ex post damages with an ex ante penalty for the reckless use of firearms in circulation: that is, fine hunters in case of double bullet. Neither the one nor the other hunters have brought a very decisive event, since the victim would have died by a single bullet. But the fact that they shot is proof that they were hunting without due caution. Then, hunting without due care is an activity that seems fair to punish even in cases where you just missed the hunting companion, therefore, not causing any damage. Continuing to analyze the issue of causation, we can analyze the case where the technical management of an enterprise of the nuclear reactor making a mistake, the result will be the release of a radioactive gas, which will lead to an increased incidence of cancer in the area, estimated the increase from 10 to 11 cases a year. Is it to be considered responsible the manager of the reactor? The plaintiff in a civil action proposed in a system of common law would have lost the case since it has to show that the chances that the defendant is guilty are greater rather than not. Considering that the probability that the defendant is guilty is equivalent to 9%, the actor loses the case. One possible way forward would be to allow the filing of civil suits for damages on a statistical basis. A cancer patient may take 1/11 of the amount of compensation he would receive if the operator of the reactor was solely responsible. One other solution could be refined to allow groups of victims to establish a case, for example 110 cancer victims establish a single proceeding for redress, in this case using the statistical data, we can say that at least 10 subjects have contracted the disease for the escape of gas. So the defendant is liable to pay compensation commensurate with that should be recognized 10 individual victims. This approach
was not, however, never applied in reality. But there is a famous case that has been addressed in a similar manner, although the roles of plaintiffs and defendants were overturned. The object of the dispute were some complications due to a fertility drug DES, which affected some of the daughters of women who had assumed. Complications occur after a minimum of 10 years. The analysis of the case raised two sets of problems: it was first necessary to investigate whether there was a provision that would allow to consider responsible the drug’s producers. In order to avoid market a drug with side effects that occur in subsequent generations, a pharmaceutical company should test every new drug before marketing it for decades and should have done so on a very large scale. These precautions are excessive, however, because the drugs would then be too expensive. The second problem was to determine which producer was responsible and in respect of which victim, in the case of leaning to the existence of the liability of pharmaceutical companies. At that time there were many companies producing the drug none of which had major proportion of the market. The Court resolved the controversy by condemning the drug companies to pay damages as a percentage of market share held, thus combining the defendants as it has previously been suggested to the actors.

**Civil liability and efficient accidents**

Our everyday activities can charge a cost to a third-party. The extent and the probability of these costs depend on the precautions we decide to take. The aim of the economic analysis on what concerns responsibilities for illicit acts is not to remove all the risks, but to achieve a proper level of precautions as well as a proper level of risk. We do not hope for a world without accidents, but for a world where only efficient accidents happen. Efficient accidents are those whose precaution would cost more than that is worth it.

To better analyze this problem, we start from an example. We are flying on a small aircraft, which has the potential for causing physical harm to other people. The probability that this will happen depends on the precautions we take. Let’s say that in this situation the principle of objective responsibility is in force - that is to say we are
responsible for damage caused by our actions. Given this, it is our interest to take all the possible precautions, i.e. an efficient level of precautions. If, on the other hand, the law subordinates the attribution of responsibility to negligence, imprudence or inexperience, we will be responsible for the accident only if we have not previously taken the precautions financially justified. In the juridical field this case is called Hand Formula. This formula states that a party should be deemed negligent if he fails to take all the precautions that a rational person would have taken if both responsible and victim. The principle of objective responsibility and the Hand formula conflict. Applying the first one, there would be a greater number of trials, that however would be more straightforward, since there would be no need to demonstrate the negligence of the person involved.

Let’s examine the process of the objective responsibility and of the negligence supposing that the court is not completely informed on the events of the dispute and on the precautions taken by the responsible of the tort. There are two types of precautions: those observable (the court is aware of what has been done and of what should have been done) and those non-verifiable. In the case of objective responsibility, the court has no need to know the precautions which have or should have been taken. In the other case, all the justified precautions taken, the injurer will be deemed not negligent, not guilty and therefore not responsible for the accident.

Our level of activity is considered by the author a non-verifiable precaution. For instance, the judge will never have the complete information on the net value of a car trip and on the expected damage to people or things that the car might hit on its way. In conclusion, we can say that the more non-verifiable precautions affect the event, the more the objective responsibility system seems to be preferable to the negligence one, as the objective responsibility encourages to take the external costs into consideration while deciding on the non-observable precaution.

The problem of competition causes
So far we have analyzed cases in which only one of the parties could take precautions. However there are cases, such as in car crashes, in which the probability that they will happen depends on the decisions taken by both parties involved. Taking into consideration also that when two cars collide, usually both get damaged, we can simplify the situation thinking about accidents between cars and tanks, where only the car will get damaged. If there is a law which does not provide for any form of responsibility, both the drivers will have an efficient behavior and they will be charged of full cost of the accident, even though the tank driver will not get any damage. We could then compensate for it applying the principle of the objective responsibility to the tank driver, who will be charged of the car’s damage cost. However, in this way, the car driver will not be encouraged to take any precaution.

On the other hand, the rule of negligence solves the problems of efficient incentives in a world of multiple causes. The same effect is achieved by a law that provides for an objective responsibility which permits the demonstration of contributory negligence. In order to have really effective solutions, we have to suppose that the court is fully aware of the events and that it is clear that in case of an accident a driver who has not taken an efficient level of precaution will be punished. In actual fact the central Authority is unlikely to have all the information, and its decisions will not be totally effective.

Usually people involved will choose the level of efficient diligence on the basis of the verifiable precautions, but we should bear in mind that both the court and the parties may make mistakes: the judge may get wrong in establishing the efficient level of precaution, and deem a behavior negligent even though it is not or the injurer or the court may underestimate the efficient level of precautions. All the parties involved in the accident, for example, will try to be judged diligent by the court, even if they are wrong. In fact sometimes the court is not aware enough of the parties’ behavior, and estimates their precaution level comparing it to that of an ideal person. In conclusion, we can say that, being the principle of objective responsibility in force, a racing driver for example, is aware that he will be charged of all the costs and he will
autonomously take his decision of exceeding the speed of an average driver, on the basis of the information on his personal skills.

**The amount of compensation**

In this paragraph the author analyzes the problem of the criteria whereby the extent of damages is assessed. According to the traditional procedure it should correspond to the amount that is necessary to fully compensate the victim in order to re-establish the situation before the accident.

In the event that all culprits are found, put on trial and convicted, this kind of approach is effective. But in actual fact the information is incomplete, the legal process is expensive and tribunals do not have an absolute knowledge.

A solution could be to re-evaluate the extent of the compensation in order to balance the fact that the probability of success of a trial is lower than 100%. On the other hand, in the common law systems retributive compensations, that go over the extent of the caused damage, are usually applied. But the retributive compensation requires a particular condition – that the tort was committed intentionally or happened because of a serious negligence.

We can find six different arguments that justify or deny the existence of such compensations:

1. Retributive compensations do not exist. Those that are thus qualified are just compensations for damages of difficult quantification.
2. Ordinary compensations do not imply a moral judgment on the injurer, who is only expected to provide a compensation, as much complete as possible, of the caused damage. On the contrary retributive compensations express a formal reproach.
3. Retributive compensations represent a multiplier of probabilities, in order to counterbalance the probability that the injurer will never be put on trials or that the victim will not win the trial.
4. Retributive compensations are suitable for cases where damages are difficult to evaluate, but in this case it’s improbable that the tort committed is efficient. This
choice represents for the parties involved an incentive to act carefully, also discouraging the efficient torts.

5. Retributive compensations seem particularly appropriate in the cases where potential injurers can be actually discouraged.

6. Retributive compensations have the purpose of discouraging intentional torts. Let’s consider for example a behavior that intentionally hurts other people – beating a guy that is trying to arrange a date with the girl we like. We are mainly interested in discouraging potential admirers of our girl. The beaten guy sues us and get the compensation for the suffered damage, even though he hasn’t actually been harmed and he does not have an incentive to avoid that behavior in future.

Going on with the analysis of the problem of the damage extent, we can highlight the fact that in civil law the offender must pay the compensation directly to the victim, whereas in criminal law the compensation goes to the nation’s coffers.

In this case, every extrajudicial arrangement that guarantee for the victim an amount higher than zero improves his situation. On the other hand every compromise that implies a payment lower than the compensation extent is a benefit for the offender. If the compensation goes to the victim instead of to the nation’s coffers, the possibilities of negotiation are less, given the fact that the victim will accept only an offer that covers at least the same amount that the court would have assigned, minus the legal costs saved with the deal.

According to English law of XVIII century, every citizen could prosecute a crime (even if they are not the victim). However, there are three good reasons to give the victim the right to begin a legal case:

1. the victim is the person who best knows whether a crime has been committed;
2. the victim probably knows how the events unrolled;
3. the victim by taking legal action, discourages any future offence.

A law that gives the fine to the victim assembles all incentives in one person, avoiding wasteful dealings. Usually the compensation given to the victim is justified
by the fact that in this way the victim is compensated for the suffered losses. From this point of view, civil law is a poor form of insurance.

**Responsability for faulty product: the coca cola case**

During the last years the cases of responsibility for faulty products have represented a considerable part of judicial contentious. The problem is to understand who must be considered responsible between the seller (caveat venditor rule) and the buyer (cavea emptor rule) when something goes wrong in the product usage. The necessity to solve this problem rose from real cases of coca coca bottles that exploded. Even if the Coca Cola is not considered the responsible of the explosion, it must take precautions to prevent his bottles’ explosion in order to defend his reputation. It is the same for the consumer who wants to avoid accidents, enduring all costs. The same would be in caveat venditor’s case if coca cola would be informed about the usage of every single bottle by the consumer.

In the case in which the seller knows the risk (but the buyer ignores it) the best solution, in spite of a caveat venditor’s rule, would be to insure the product. The buyer buys the product and the policy.

In order to examine the best solution, it must be analyzed which part has the best pieces of information about risk’s identity between the producer and the buyer. In the first case it will be used caveat venditor rule, in the second case caveat emptor rule.

It is also important to analyze the costs of judicial procedure related to the two rules. According to caveat emptor nobody is responsible, nobody is subjected to judgment, nobody must pay lawyers.

According to caveat venditor the consumer who was subjected to an injury must begin the judgment in order to cash the recompense. In a regime of contractual freedom the courts impose some standard clauses of responsibility, but they give to the parts the opportunity of modify them. The reasoning in favor of contractual autonomy is in the fact that both consumers and sellers are rational and have some relevant pieces of information, but it doesn’t require that kind of causative information that are indispensable in order to prefer caveat emptor rule.
Information values and judicial errors

The evaluation of information is expensive both for the producer and for the consumer: the evaluation of the information will show if it’s better to do it or not. The information that has just a modest effect on the consumer’s evaluation has little possibility to influence his inclination to buy it. Thereby the omission of providing an information shouldn’t be sanctioned with the exception of the case in which the information has an important effect on the goods value for the consumer. If we apply this statement to the living right, we can analyze the processes consequent to the polio vaccine. In one case on a million the poliomyelitis sprang from the vaccine, here rose the problem if the vaccine’s producers had been negligent by omitting important information to the consumers. In this case we have to estimate how much the warning would have affected on product usage. This is what the court tried to do in the concrete case, even if he did a blatant error in his verdict, comparing the risk to which the person is exposed by having a vaccination with the risk of not to be immunized. But the immunization last a lifetime, so the significant comparison must be done with the possibility to contract the polio during the lifetime.

Fragile bones and incoherent rules

The potential victims of a harmful event present different degrees of vulnerability. If the legal norm would limit the compensation to how much can reasonably be estimated, the ones who cause damages to specially fragile victims would pay a recompense on the average, while the ones who cause a damage to specially robust victims would pay a smaller amount.

On the contrary, the imposition to compensate victims according to the particular conditions that characterize them, stimulate the potential authors of crimes to choose a level of precautions on the average correct.
Annual or flat rate compensation

If the court recognize the compensation of the damage to the injured party, there will be the problem if the compensation must contain health costs relating to each year of cure and of ceasing gain, little by little it realize itself, or the court should recognize a flat rate on the base of his own valuation? Today’s law seems to be oriented at the second solution. Moreover with flat rate payments the costs related to fake lesions reduce, since it’s possible to stop the simulation that has been done in order to obtain the compensation, when the check is cashed.

A question to reflect

The motorway traffic exhibit people to a continuous risk. People who drive accept the risk to be subjected to damages, as well as people who pass nearby storage of dumping that are full of heavy wealth material. In these two cases people can’t obtain a compensation, in the absence of a proof that at the beginning of the accident there was a lack of diligence or valuation. This is really happened. Was the judge right thinking that the responsibility must be subordinate to the positive verification of a subjective behavior of negligence in this case?